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Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

OCT 30 1997

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

Preemption of State and Local Zoning and  
Land Use Restrictions on the Siting,  
Placement and Construction of Broadcast  
Station Transmission Facilities

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MM Docket No. 97-182

**COMMENTS OF  
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS  
AND THE PUBLIC BROADCASTING SERVICE**

The Association of America's Public Television Stations ("APTS") and the Public Broadcasting Service ("PBS") (collectively "APTS/PBS") submit these comments in response to the Commission's *Notice of Proposed Rulemaking* in above-captioned proceeding released on August 19, 1997 ("*Notice*"). APTS/PBS filed comments in support of the Petition for Further Notice of Proposed Rule Making filed jointly by the National Association of Broadcasters ("NAB") and the Association for Maximum Service Television ("MSTV") which led to the issuance of the *Notice* ("NAB Petition").

**INTRODUCTION AND SUMMARY**

APTS/PBS recognize and support the legitimate interests of state and local governments incorporated in their land use regulations. However, APTS/PBS are also concerned that overly restrictive state and local land use regulations, the costs of compliance with some land use provisions, and the delays frequently associated with obtaining approval for new television facilities or modifications of existing facilities will impede the ability of many public television

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licensees to make the transition to DTV.<sup>1</sup> Accordingly, APTS/PBS urge the Commission to adopt regulations preempting state and local land use regulations that inappropriately delay, burden or prevent broadcasters from complying with the Commission's rollout for DTV.<sup>2</sup>

### **ARGUMENT**

APTS and PBS are nonprofit organizations whose members comprise nearly all of the nation's 175 noncommercial educational television licensees. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch, as well as engaging in planning and research activities on behalf of its members. PBS provides program distribution and other services to its members and is also a leader in the development of new and improved television technologies and frequently speaks for the public television community in matters relating to the use of television broadcast spectrum.

APTS/PBS recognize that state and local governments have a substantial interest in assuring that the land in their community is used appropriately and in preserving the quality of life through controlling development. At the same time, however, APTS/PBS are concerned about overly aggressive and potentially disingenuous enforcement of land use restrictions which may effectively preclude the construction or modification of the television facilities essential to implement the Commission's and Congress's goals for the rapid conversion to DTV. Accordingly, APTS/PBS supported the NAB Petition urging the Commission to preempt state

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<sup>1</sup> By land use, APTS/PBS include issues of health, environmental, safety and aesthetic concerns that state and local regulators address in their regulations.

<sup>2</sup> While APTS/PBS are primarily concerned with the effects of overly restrictive state and local regulations on the implementation of DTV, the Commission should also preempt any restrictions that unduly restrict new NTSC facilities coming on air or improvements to existing NTSC facilities.

and local land use restrictions that unreasonably prohibit or delay DTV rollout and request the Commission to adopt rules that will afford broadcasters relief from such state and local regulations.

Preempting unreasonably restrictive state and local land use regulations is especially important for the nation's public television stations. As APTS/PBS have argued at length in their various submissions in the Commission's DTV proceeding,<sup>3</sup> many of the nation's public television stations face severe difficulties in financing the DTV conversion. Indeed, public television has only recently submitted to the Office of Management and Budget a request for \$771 million to fund approximately 45% of the costs public television anticipates will be incurred in converting the current public television system to DTV. Raising the additional funds will strain the fundraising abilities of even the strongest stations. As a result, public television stations can ill afford the delays, uncertainty and costs of unreasonable state and local land use regulations or the costs of complying with burdensome and vexatious conditions imposed on the grant of authority to construct or modify television facilities.

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<sup>3</sup> See, e.g., *Comments of Association of America's Public Television Stations, Corporation for Public Broadcasting and Public Broadcasting Service* in MM Docket No. 87-268, filed January 7, 1993; *Petition for Reconsideration and Clarification of Association of America's Public Television Stations and Public Broadcasting Service* in MM Docket No. 87-268, filed June 13, 1997.

**I. Unreasonably Restrictive and Expensive State and Local Land Use Regulations Will Increase the Cost of and Delay DTV Rollout by Public Television Licensees**

In accordance with Congress's mandate,<sup>4</sup> the Commission has adopted an accelerated schedule for the construction of DTV transmission facilities. Affiliates of the top four commercial networks in the top 10 markets are required to be on the air with digital signals by May 1, 1999, and affiliates of those networks in markets 11-30 must be on the air six months later. All other commercial television stations are required to be on the air by May 1, 2002, and noncommercial stations, including all of the members of APTS and PBS, must be on the air by May 1, 2003. *See In re Advanced Television Systems*, 1997 WL 193828.

While public television stations have been given a little more time to deploy their DTV stations than commercial stations, they still face a tight schedule if they are to complete the construction of their DTV facilities by May 1, 2003. As APTS/PBS noted in their filings in the Commission's DTV proceeding,<sup>5</sup> public television licensees must devote substantial time and resources to develop and implement the capital campaigns required to finance the construction of DTV facilities. At the least, public television licensees must know the costs of conversion

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<sup>4</sup> The accelerated schedule for the construction of DTV facilities reflects Congressional mandates. Section 157 of the Communications Act of 1934 (the "Communications Act") states that it is the policy of the United States to encourage the provision of new technologies and services to the public. Section 151 of the Communications Act states that the purpose of the Act includes making available a rapid, efficient nationwide and worldwide radio communication service with adequate facilities. Section 336(c) of the Communications Act authorizes the recovery of spectrum after the conversion to DTV.

<sup>5</sup> *See Comments of Association of America's Public Television Stations, Corporation for Public Broadcasting and Public Broadcasting Service* in MM Docket No. 87-268, pp. 11-20 filed January 7, 1993.

in order to develop those plans, and those costs will be materially affected if the licensee must build a new transmission tower or strengthen an existing tower. Construction of a new tower typically requires zoning approval and in many situations modifications in existing towers are also subject to local regulatory requirements. The costs and delays associated with obtaining necessary zoning approvals and with complying with costly landscaping or other conditions can significantly affect the ability of many public television licensees to meet the Commission's construction deadline. Indeed, the mere uncertainty of whether approval will be obtained and, if so, subject to what conditions, delays the planning process, potentially increasing the costs of DTV conversion and impairing the licensee's ability to meet the Commission's deployment schedule.

While APTS/PBS anticipate that many local land use regulators will cooperate with public television licensees and not impose unreasonable requirements on them or delay the necessary approval unreasonably, others will not. Because such cooperation cannot be assured in every instance, some public television licensees will be subject to lengthy administrative and court proceedings. Even where the local regulators cooperate with the local public broadcaster, local citizens' groups can oppose the licensee's proposal and challenge actions by the local authorities granting permits. Public television stations also may confront land use regulations that, instead of restricting broadcasting facilities to appropriate locations within the community, effectively forbid the construction of new broadcasting facilities in the community. Since the Commission's DTV Table of Allotments is based on licensees operating their DTV stations from a site within 3 miles of their current transmitters, in many cases such regulations will make it extremely difficult for public television licensees to obtain suitable replacement sites.

Such a hostile regulatory climate not only will delay the ability of a public television station to commence DTV operations, but also will divert its limited funds to the costs of litigating land use issues or the costs of complying with unreasonable conditions -- funds that could be used for DTV construction. Those regulatory delays will mean a delay in making available to the local community the substantial benefits that digital transmission that offer -- a greater diversity of public television programming and the benefits of higher resolution in unique programming offered only on public television.

**II. The Commission Should Preempt Unreasonable Restrictive and Expensive State and Local Land Use Regulations**

**A. Many State and Local Land Use Regulations Make It Costly and Difficult, If Not Impossible, to Construct New or Improve Existing Television Facilities**

The NAB Petition contained examples of situations in which television stations had faced significant difficulties in obtaining approval for towers needed for DTV operation. APTS/PBS have received several similar reports from public television licensees.

North Texas Public Broadcasting, Inc., licensee of Station KERA, Dallas/FT. Worth, Texas and Station KDTN, Denton, Texas, encountered local regulators' resistance to its attempt to purchase property to construct a DTV tower. The station located a 60-acre undeveloped tract surrounded by undeveloped land, bought a six-month option from the owner, and filed for FAA approval and re-zoning. The municipal council denied the re-zoning application and then imposed a 120 day moratorium on all tower-related zoning applications and building permits. During the moratorium, the station's six-month option for the land expired. The council then adopted, for the first time ever, broadcast facility construction regulations that make building,

modifying and operating towers very difficult. Additionally, the council annexed unincorporated land outside city limits that might also have been suitable for building a DTV tower.

Council for Public Television, Channel 6 Inc., licensee of Station KRMA, Denver, has advised that the county has classified its transmission facility as a "non-conforming use" and prohibited any upgrading, including for DTV conversion. Thus, the classification prohibits the station from adding antennas to the tower, strengthening the tower, or performing any other activity that would cause a change in the appearance of the tower. KRMA is forced to seek a new location to construct a DTV tower, at great expense and with anticipation of possibly waiting years for county approval of the facility.

Northeastern Educational TV of Ohio, Inc., licensee of Station WNEO, Akron and Station WEAO, Youngstown, Ohio, reports that, in one local community, it can be difficult to obtain permission to build television towers on land that is not government-owned and that the rental fees for government-owned land are far above fair market value. The Board of Trustees of Clark County School District, licensee of Station KLVX, Las Vegas, reports similar constraints on finding suitable sites for a new tower. Antenna location is restricted to specific sites that are subject to rapidly rising rental rate increases and which prohibit even marginal expansion of the facilities.

Shenandoah Valley ETV Corp., licensee of Station WVPT, Staunton, Virginia, has advised that the county recently adopted a burdensome new telecommunications ordinance that applies to all new or modified broadcast facilities. The ordinance requires that any new towers built for one antenna be able to hold three antennae, thus significantly increasing the costs of

construction. Further, the ordinance contains inspection and landscaping requirements that the station estimates alone will cost it in excess of \$50,000 when it begins its conversion to DTV.

Of course, these are just examples of the kinds of problems some public television licensees have faced; other stations will face similar obstacles in securing authority to build or modify transmitter towers. And, as these examples indicate, these obstacles can and will arise in any market, not only the largest. Accordingly, Commission action is essential if unreasonable local regulations and enforcement proceedings are not to thwart the Commission's and Congress's goal of making a rapid transition to DTV.

**B. The Commission Can Preempt State and Local Regulations That Impair Federal Communications Policy**

APTS/PBS recognize that state and local governments have a legitimate interest in regulating broadcasting transmission facility construction to protect public health and safety and to preserve community aesthetic qualities. Public broadcasters, committed to serving their communities, support these efforts by local governments to assure that their communities retain their unique character and quality of life. Sometimes, however, as the examples given above illustrate, local regulation can become unreasonably restrictive and preclude the implementation of Commission and Congressional policies. In such circumstances, the Commission has the authority under the Communications Act to preempt unreasonably restrictive state and local land use regulations.

It is well established that "a federal agency acting within the scope of its congressionally delegated authority may preempt state regulation," *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 369 (1986), and Congress has clearly given the Commission exclusive authority to regulate all forms of radio communications, including DTV. "[T]he Commission has been



given 'broad responsibilities' to regulate all aspects of interstate communications by wire or radio by virtue of Section 2(a) of the Communications Act of 1934." *Capital Cities Cable v. Crisp*, 467 U.S. 691, 700 (1986). ; see also, *National Broadcasting Co. v. U.S.*, 317 U.S. 190, 213 (1943); *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 137 (1940). Moreover, in the Telecommunications Act of 1996, Congress also directed the Commission to expedite the conversion to DTV in order to permit recovery of spectrum after conversion to DTV,<sup>6</sup> and in the Balanced Budget Act of 1997, directed the Commission to auction the reclaimed spectrum by September 30, 2002.<sup>7</sup> Consequently, there is a clearly established Commission and Congressional policy to move the nation's television system to digital in an expeditious fashion and, to the extent that unreasonable local land-use regulations impair that policy, the Commission has the power to preempt those regulations.

The Commission previously has relied on similarly broad provisions of the Communications Act to preempt unreasonably restrictive state and local regulation of satellite earth station placement and amateur radio antenna facilities. With regard to satellite earth stations, the Commission relied on the provisions of the Communications Act that authorize it to license satellites and create rights to receive unscrambled and unmarketed satellite signals. See Preemption of Local Zoning Regulation of Satellite Earth Stations, 11 FCC Rcd 5809, ¶ 11 (1996). With regard to amateur radio antenna facilities, the Commission cited the "strong federal interest in promoting amateur communications" as evidenced by "the comprehensive set of rules that the Commission has adopted to regulate the amateur service." See Federal

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<sup>6</sup> 47 U.S.C. § 336(c).

<sup>7</sup> See P.L. 105-32, §3003, codified as 47 U.S.C. §309(j)(14)(C).

*Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 101 F.C.C.2d 952, ¶ 24 (1985). Satellite earth station preemption and amateur radio preemption thus supply ample precedent for DTV preemption based on a wide-ranging Congressional grant of authority to the Commission.

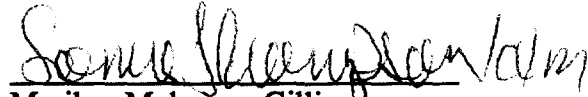
### **Conclusion**

The nation's public television licensees are eager to serve their communities through the new medium of DTV with quality public interest programming responsive to local interests. In some communities, unreasonably restrictive state and local land use regulations may delay public television stations from doing so. Such delays are especially serious for noncommercial broadcasters, which cannot afford lengthy local reviews, hearings, and possible litigation over the siting of DTV facilities or the costs of complying with expensive, overly burdensome regulations that hinder DTV construction.

APTS/PBS thus urge the Commission to adopt rules preempting state and local land use restrictions that unreasonably prohibit or delay the DTV rollout and other broadcast transmission facility construction or unreasonably increase the costs of DTV construction. The proposal on record submitted by the NAB and MSTV would accomplish the goal. While some adjustments to the precise proposal may be appropriate to accommodate legitimate local and state interests, it is vital that the Commission take positive action to

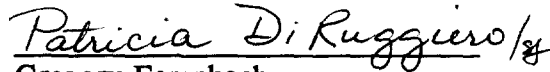
assure that state and local land use regulations do not preclude public television licensees from meeting the Commission's accelerated DTV rollout schedule.

Respectfully submitted,



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